

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
STATE HISTORIC PRESERVATION DIVISION
Honolulu, Hawaii

December 9, 2005

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

Regarding: Appointment and Selection of a Hearing Officer to Conduct All Hearings
for One (1) Contested Case Hearing

Subject Petition: **Docket No. 05-OA-02**
In the matter of a Contested Case to Appeal Staff's Recommendation Regarding Violation of Hawaii Revised Statutes (HRS) §6E-43(a), §6E-43.6(a), and §6E-11 for failure to timely notify the proper authorities of an inadvertent burial discovery, and for moving human remains without permission; Violation of Hawaii Administrative Rules (HAR), for the unauthorized physical examination of the remains of children, including infant remains, and the unauthorized physical examination of presumptively Native Hawaiian remains; and Violation of HAR §13-300-32, for the failure to examine human skeletal remains in a respectful manner with a recognition of the sensitivities associated with deceased human beings.

Background

On November 18, 2005, the Department received a letter for a Contested Case (**Exhibit 1**) from Tim Lui-Kwan (representing Aki Sinoto Consulting, Akihiko Sinoto, L.J. Moana Lee, Paul Titchenal, International Archaeological Research Institute, Inc., J. Stephen Athens and Rona Ikehara) contesting staff's findings and recommendations (**Exhibit 2**).

Authority for Designating Hearing Officers

Hawaii Administrative Rules (HAR) Section 13-1-32 (d) provides that the Board may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing. HAR Section 13-1-29 (a) provides that, "the time for making an oral or written request and submitting a written petition may be waived by the Board."

Additionally, Hawaii Revised Statutes Sections 92-16 and 171-6 also provide that the Board may delegate to the Chairperson the authority to select the hearing officer to conduct a Contested Case Hearing.

Basis for Designating Hearings Officers

Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearing, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

Discussion:

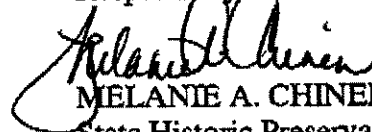
Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. As indicated above, the determinations of standing have not yet been made. Staff believes that the preliminary hearing on standing should also be conducted by the Hearing Officer rather, than the full Board. After the Hearing Officer conducts the preliminary hearing on standing, the Board would still retain its discretion in issuing Orders on this matter of standing. Further, should standing be granted, at the conclusion of the case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

Staff therefore recommends,

Recommendation:

- 1) That the Board authorize the appointment of a Hearing Officer for Contested Case 05-OA-02, and let the Hearing Officer conduct all the hearings relevant to the subject petitions for a Contested Case Hearing, and
- 2) That the Board delegate the authority for selection of the Hearing Officer to the Chairperson.

Respectfully Submitted,



MELANIE A. CHINEN, Administrator
State Historic Preservation Division

Attachments

Approved for submittal:



PETER T. YOUNG, Chairperson
Board of Land & Natural Resources

CARLSMITH BALL LLP

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OUR REFERENCE NO.:
058479-1

November 18, 2005

HAND-DELIVERY

Mr. Peter Young, Chairman
Board of Land and Natural Resources
State of Hawaii
P.O. Box 621
Honolulu, Hawaii 96809-0621

Re: Request for Contested Case Hearing: In the Matter of the Request of the State Historic Preservation Division for an Order pursuant HRS §6E-10.5(a)(2) for Imposition of Administrative Penalties dated November 18, 2005; Petitioners: Aki Sinoto Consulting, Akihiko Sinoto, L.J. Moana Lee, Paul Titchenal, International Archaeological Research Institute, Inc., J. Stephen Athens and Rona Ikehara; Location: TMK No.1/2-3-16: 09 & 43; Bounded by Keeaumoku, Sheridan and Makaloa Streets in Honolulu, Hawai'i

Dear Mr. Young:

Our law firm represents Aki Sinoto Consulting, Akihiko Sinoto, L.J. Moana Lee, Paul Titchenal, International Archaeological Research Institute, Inc., J. Stephen Athens and Rona Ikehara, in the above matter. Please find enclosed the original and one (1) copy of their written Petition for Contested Case Hearing pursuant to HAR Section 13-1-28, *et seq.* for the Land Board's consideration.

It is my understanding that the SHPD request is on the agenda for Board's meeting today although it was unclear whether a public hearing was requested or whether this matter has been scheduled for disposition at this meeting. Out of an abundance of caution, we have decided to request a contested case, however, we would happy to provide the Board with any additional information or material you require in support of this Petition. Thank you for your attention to this matter.

Sincerely,

CARLSMITH BALL LLP



Tim Lui-Kwan

C: BLWR
HP

HONOLULU

KAPOLEI

HILO

KONA

MAUI

GUAM

SAIPAN

LOS ANGELES

EXHIBIT NO. 1

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Tel. No. (808) 523-2500

Attorneys for Petitioners

AKI SINOTO CONSULTING, AKIHIKO SINOTO,

L.J. MOANA LEE, PAUL TITCHENAL,

INTERNATIONAL ARCHAEOLOGICAL

RESEARCH INSTITUTE, INC., J. STEPHEN

ATHENS and RONA IKEHARA

**STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES**

IN THE MATTER OF THE REQUEST OF
THE STATE HISTORIC PRESERVATION
DIVISION FOR AN ORDER IMPOSING
ADMINISTRATIVE PENALTIES
PURSUANT TO HRS §6E-10.5(A)(2)
AGAINST AKI SINOTO CONSULTING,
AKIHIKO SINOTO, L.J. MOANA LEE,
PAUL TITCHENAL, INTERNATIONAL
ARCHAEOLOGICAL RESEARCH
INSTITUTE, INC., J. STEPHEN ATHENS
and RONA IKEHARA, TAX MAP KEY
NO.:(1) 2-3-16:09 & 43 BOUNDED BY
KEEAUMOKU, SHERIDAN AND
MAKALOA STREETS IN HONOLULU,
HAWAII

PETITION FOR CONTESTED CASE
HEARING

PETITION FOR CONTESTED CASE HEARING**Legal Authority**

1. Petitioners AKI SINOTO CONSULTING, AKIHIKO SINOTO, L.J. MOANA LEE, PAUL TITCHENAL, INTERNATIONAL ARCHAEOLOGICAL RESEARCH INSTITUTE, INC., J. STEPHEN ATHENS and RONA IKEHARA, by and through their undersigned counsel, have a right to request a Contested Case Hearing pursuant to Hawaii Administrative Rule (HAR), Title 13, Department of Land and Natural Resources, Subtitle 1 (Administration), Chapter 1(Rules of Practice and Procedure), Subchapter 5 (Contested Case Proceedings), Section 13-1-28 et seq.

Petitioners' Standing for Request of Contested Case Hearing

1. Pursuant to Title 13, Department of Land and Natural Resources, Subtitle 1, Administration, Chapter 1, Rules of Practice and Procedure, Subchapter 5 (Contested Case Proceedings), Section 13-1-31 (Parties)(a)(3) states "All persons...who can otherwise demonstrate that they will be so directly affected and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application."
2. The Petitioners AKI SINOTO CONSULTING, AKIHIKO SINOTO, L.J. MOANA LEE, PAUL TITCHENAL, INTERNATIONAL ARCHAEOLOGICAL RESEARCH INSTITUTE, INC., J. STEPHEN ATHENS and RONA IKEHARA, are specific parties whose "legal rights, duties, or privileges" are required by law to be determined after an opportunity for an agency hearing as set out in the definition of a Contested Case, HAR Section 13-1-2.

Petitioners' Interest that may be Affected

1. The Petitioners have a substantial interest in the issuance of any Order by the Board of Land and Natural Resources finding violations of HRS Chapter 6E and HAR Title 13 Chapter 300 (Burial Sites and Human Remains) and imposing administrative penalties pursuant to HRS §6E-10.5(a)(2).

The disagreement, denial, or grievance which is being contested by the Petitioner


1. The Petitioners disagree with the findings and recommendations of the State Historic Preservation Division and are entitled to submit evidence and argument to dispute allegations that Petitioners have violated State Historic Preservation regulations.

The relief to which the Petitioners seeks or deems itself entitled.

1. Petitioners request that the Board of Land and Natural Resources deny the request, dated November 18, 2005, from the State Historic Preservation Division for imposition of administrative penalties pursuant to HRS 6E-10.5(a)(2).

DATED: Honolulu, Hawaii, November 18, 2005

CARL SMITH BALL LLP



TIM LUI-KWAN
Attorneys for Petitioners

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L.J. MOANA LEE, PAUL TITCHENAL,
INTERNATIONAL ARCHAEOLOGICAL
RESEARCH INSTITUTE, INC., J. STEPHEN
ATHENS and RONA IKEHARA

STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

IN THE MATTER OF THE REQUEST OF
THE STATE HISTORIC PRESERVATION
DIVISION FOR AN ORDER IMPOSING
ADMINISTRATIVE PENALTIES
PURSUANT TO HRS §6E-10.5(A)(2)
AGAINST AKI SINOTO CONSULTING,
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NO.:(1) 2-3-16:09 & 43 BOUNDED BY
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HAWAII

PETITION FOR CONTESTED CASE
HEARING

PETITION FOR CONTESTED CASE HEARING

Legal Authority

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1. The Petitioners disagree with the findings and recommendations of the State Historic Preservation Division and are entitled to submit evidence and argument to dispute allegations that Petitioners have violated State Historic Preservation regulations.

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1. Petitioners request that the Board of Land and Natural Resources deny the request, dated November 18, 2005, from the State Historic Preservation Division for imposition of administrative penalties pursuant to HRS 6E-10.5(a)(2).

DATED: Honolulu, Hawaii, November 18, 2005

CARLSMITH BALL LLP



TIM LUI-KWA N
Attorneys for Petitioners

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
HISTORIC PRESERVATION DIVISION
Honolulu, Hawaii

November 18, 2005

Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii

REGARDING:

COUNT 1 Violation of Hawaii Revised Statutes ("HRS") §6E-43(a), §6E-43.6(a), and §6E-11, for failure to timely notify the proper authorities of an inadvertent burial discovery, and for moving human remains without permission;

COUNTS 2 – 18 Violation of Hawaii Administrative Rule ("HAR") §13-300-32, for the unauthorized physical examination of the remains of children, including infant remains, and the unauthorized physical examination of presumptively Native Hawaiian remains;

COUNTS 19- 21 Violation of HAR §13-300-32, for the failure to examine human skeletal remains in a respectful manner with a recognition of the sensitivities associated with deceased human beings.

BY:

Aki Sinoto Consulting; Akihito Sinoto, L.J. Moana Lee, and Paul Titchenal
2333 Kapiolani Boulevard, No. 2704 Honolulu, Hawaii 96826.
International Archeological Research Institute, Inc., J. Stephen Athens, Rona
Ikehara -Quebral, 2081 Young Street, Honolulu, Hawaii 96826-2231

LAND OWNERSHIP:

Wal-Mart Real Estate Business Trust.

TMK:

(1) 2-3-16: 09 & 43 bounded by Keeaumoku, Sheridan, and Makaloa Streets in
Honolulu, Hawaii.

AREA OF PARCEL:

10.5 acres

INTRODUCTION:

Native Hawaiian burial sites are part of the historic and cultural heritage of the State and are accorded significant and important protections under state law. Chapter 6E of the HRS and its applicable administrative rules, Chapter 13-300 HAR, set forth the laws that must be followed for treatment of historic property including Native Hawaiian and other burials. Among these laws are specific procedures that must be followed when burials are encountered during construction activities. These procedures include but are not limited to the requirement that when a burial is found all construction activity in the immediate vicinity of the burial must halt, and that specified state authorities must be contacted so that they can determine the proper treatment of the remains. Additionally, there are important limitations and procedures that must be followed when any physical examination of human remains takes place. Included in these limitations is the requirement that written requests must be made to the State, and written approval must be granted by the State prior to initiating any intrusive or destructive methods of examination.

The claims herein arise from 1) the removal of human remains without notification to the State or state approval, and 2) multiple instances of the unauthorized physical examination of remains that should not have been subjected to examination. The unauthorized examination of remains included the examination of remains that were presumptively Native Hawaiian, juvenile remains, including the remains of infants, and remains for which requests for examination had been specifically denied by the State. Additionally, in several instances it is evident that some remains were not examined in the respectful and sensitive manner required by law. Examples of this include writing on a child's skull with indelible red ink, taping a child's teeth to an index card, using duct tape and modeling clay to hold remains together, and writing the words "Handbag Louis Vuitton" on a paper sack that contained a human hand.

BACKGROUND:

In the winter of 2003, several burials were inadvertently discovered during construction of the Keeaumoku Wal-Mart Sam's Club stores. The remains were determined to be over fifty years of age, thus the burial site was found to be within the jurisdiction of the Department of Land and Natural Resources ("department"). The initial discovery of human remains occurred on January 17, 2003. A few months after the discovery of the burials Hui Malama I Na Kupuna O Hawai'i Nei, a Native Hawaiian organization, and individual plaintiff Paulette Ka'anohiokalani Kaleikini filed suit against Wal-Mart and the State. Their complaint was subsequently amended to include claims against the City and County of Honolulu. The suit asked for injunctive relief to prevent the State from authorizing the relocation of the burials, and sought damages for alleged injuries to the plaintiffs. Ultimately, the State settled with the Plaintiffs and the complaint was dismissed as to Wal-Mart and the City. The suit was widely publicized and during the course of the suit evidence was submitted regarding the appropriate treatment of Native Hawaiian remains.

In addition to the lawsuit there were administrative proceedings relating to the burials. As part of the administrative proceedings both the department and the Oahu Island Burial Council (burial council) considered whether the burials should be relocated or should remain in the places where they were discovered. The burial council is administratively attached to the DLNR, and as part of its regular duties the burial council is required to make recommendations regarding the appropriate management, treatment, and protection of Native Hawaiian burial sites, and other matters relating to Native Hawaiian burials. The burial council considered the disposition of the burials over several public meetings. At a meeting on February 20, 2004, the burial council unanimously recommended that the 42 sets of remains discovered to that date be relocated (as opposed to recommending that they be preserved in place). During these meetings public testimony was presented regarding what treatment of the burials would be considered appropriate.

The burial council is also required to recognize the claims of individuals who have genealogical connections to the burials. Essentially, an individual who can demonstrate a genealogical connection to a specific set of human remains is a lineal descendant, and an individual who has a genealogical connection to an ancestor from the same area where the remains were discovered is a cultural descendant. The basic effect of becoming a recognized descendant is that the descendant must then be consulted when determining the disposition of the burials. In this case 42 individuals were recognized as cultural descendants to the burials. Much of the public testimony received by the burial council came from recognized descendants.

After review of all relevant information including the recommendation of the burial council, the department determined that the human remains found on the property to date could be relocated and reburied in a single reinterment site on the property. The department conveyed its determination by letter dated February 26, 2004. At that time 42 sets of remains had been found and the State Historic Preservation Division ("SHPD") specifically required that it be immediately notified of any future discoveries of remains on the property:

"As a reminder, the department needs to be notified immediately if any additional sets of human remains are discovered during removal of the currently known inadvertent discoveries. The disposition of these and any future inadvertent discoveries will be decided on a case by case basis and within time period allowed by statute (§6E-43.6)."

This reminder was ignored. On July 17, 2004, in violation of the law and SHPD's mandate, Akihito Sinoto removed an additional set of human remains from the ground without notifying the SHPD and without any permission from SHPD to move the remains. As set forth below, this incident was investigated by the State and the imposition of penalties against the responsible parties was recommended. This willful disregard of the law is the basis of Count 1.

Ultimately all human remains discovered on the property were disinterred, and moved to a trailer on the property. The trailer served as a temporary curation facility for the project and was the laboratory for conducting analysis of the remains. Wal-Mart had earlier set aside a reinterment area (on one corner of the property) and following consultation with the descendants it was decided the remains were to be reinterred in that location.

Although SHPD's determination (that the 42 sets of remains discovered to date could be relocated) meant that the burials could be disinterred, the disinterment was subject to what is known as the burial site component of an archeological data recovery plan ("data recovery plan"). Among other things this data recovery plan is required to set forth proposed procedures for disinterment, any analysis of remains, temporary curation, and reinterment. Importantly these proposed procedures must be approved by SHPD before they can be implemented, and they must be followed once they have been approved. This is because under the law the physical examination of remains, especially Native Hawaiian remains, is prohibited unless expressly provided for. In accordance with the law, physical examination is a last resort for determining ethnicity of remains and is extremely limited. Akihito Sinoto, Paul Titchenal, L.J. Moana Lee, and Aki Sinoto Consulting prepared the data recovery plan. The data recovery plan proposed limited osteological evaluation of human remains as follow:

"A number of cultural descendants have been recognized by the OIBC. While we are not aware of information that conclusively determines either the ethnicity or temporal origins of specific individual remains, the manner and context of the burials of six individuals (BFS-1 (4), BFS-4 (1), and BFS-6 (1)), that have been interred in the flexed position, provide a basis for a reasonable belief that those individuals are Native Hawaiian in ethnicity. Accordingly, unless there are remains commingled with those individuals, further osteological evaluation of those six individuals is unnecessary.

Furthermore, as ethnicity cannot reliably be determined in juvenile remains, that is, those remains that are younger than adolescence, osteological evaluation of the individuals that have been determined to be juveniles, unless there are remains commingled with those individuals, is not warranted to determine ethnicity."

April 2004 Data Recovery Plan. By letter dated May 18, 2004, the SHPD accepted the data recovery plan with restrictions. The SHPD restrictions to the plan explicitly stated that:

No bones will be glued unless previously approved by SHPD. Gluing will only be approved if needed to render an accurate measurement that is critical to determining ethnicity or to match components of commingled remains. Gluing to repair broken remains will not be authorized.

May 18, 2004 letter from SHPD to Ms. L.J. Moana Lee, Messrs. Aki Sinoto and Paul Titchenal, and Aki Sinoto Consulting.

The project work commenced, ongoing construction was completed, and the stores opened in October of 2004. Because the ongoing osteological work on the remains appeared to be taking considerable time, the State made multiple requests regarding the status of the work. The information the State received raised serious concerns regarding both the time estimated for completion of the work and the scope of the work that was taking place. By letter dated January 25, 2005, the State required that all work be completed by February 11, 2005, and the remains be ready for reinterment on February 18, 2005. On February 17, 2005 SHPD officials entered the trailer and discovered evidence of the unauthorized physical examination of remains. SHPD subsequently initiated an investigation with the assistance of the Attorney General's office. The remains have not been reinterred and remain in the curation trailer.

Over the course of several days SHPD archeologists reviewed what had been done to the remains and documented their review. The SHPD review found that contrary to the express limitations and prohibitions of the law, and contrary to the express terms of the data recovery plan and the restrictions imposed by the SHPD, extensive unauthorized physical examination of remains had been performed. The review found that four sets of juvenile remains had been glued. The remains from eleven flexed and presumptively Native Hawaiian burials had also been glued. The extensive gluing was without authorization as no written permission had been sought of the SHPD to glue these remains, and no written permission had been given by the SHPD to glue them. The review also found that two sets of remains for which permission to glue had been requested and denied by the SHPD were glued anyway. As set forth below, these incidents were investigated by the State and the imposition of penalties against the responsible parties was recommended. This willful disregard of the law is the basis of Counts 2-18.

The law expressly recognizes the importance of the "preservation and protection of all burial sites and especially Native Hawaiian skeletal remains from unnecessary disturbance" HAR §13-300-32. The law also mandates that "Physical examination shall be conducted in a respectful manner, with recognition of the sensitivities associated with deceased human beings." HAR §13-300-32. In disregard of this requirement that remains be treated respectfully and with sensitivity, the State discovered that the hand bones of a deceased human being were being stored in a brown paper sack that had been labeled "Handbag Louis Vuitton." Additionally, one juvenile skull was written upon in indelible red ink, and one set of a juvenile's teeth had been taped to an index card. As set forth below, these incidents were investigated by the State and the imposition of penalties against the responsible parties is recommended. This willful disregard of the law is the basis of Counts 19-21.

THE PARTIES:

Aki Sinoto Consulting, Akihito Sinoto, and Paul Titchenal – Aki Sinoto Consulting is a sole proprietorship owned by Akihito Sinoto. Dick Pacific Construction, the general contractor for the Wal-Mart/Sam's Club project hired Mr. Sinoto through his company as its archeological consultant. Mr. Sinoto's original work on the project began in approximately June of 2000 when he prepared an assessment report for the project. Subsequent to that his work included the monitoring of construction activities for any impact on historic property, the preparation of plans relating to the disinterment of human remains, the temporary curation of human remains, obtaining of qualified physical anthropologists to perform any permitted analysis on human remains, and preparing a plan regarding the reinterment of human remains. Essentially, Mr. Sinoto was the head archeologist and had overall responsibility for and supervision over all of the archeological work at the property. In that role Mr. Sinoto met with state personnel and cultural descendents to the burials, attended burial council meetings and court proceedings relating to the project, and hired personnel to perform analysis of human remains. As head archeologist Mr. Sinoto was also responsible for the preparation of plans and reports that are required by law. As part of his contract Mr. Sinoto represented that archeologist Paul Titchenal would serve as the principal investigator for the project. As principal investigator Mr. Titchenal has certain responsibilities as set forth under applicable law.

International Archeological Research Institute, Inc ("IARII"), J. Stephen Athens, and Rona Ikehara-Quebral – IARII was hired by Mr. Sinoto to do the osteological work for the project. Ms. Ikehara-Quebral served as supervisory osteologist and was required to oversee the work of Ms. Lee and any laboratory assistants. J. Stephen Athens served as the Principal Investigator overseeing the osteological component of the project. As principal investigator Mr. Athens has certain responsibilities as set forth under applicable law.

L.J. Moana Lee - Ms. Lee is an archeologist and an osteologist, hired by Mr. Sinoto to assist with archeological monitoring and later to work with the project osteologist on the subject remains.

THE STATE'S INVESTIGATION:

Count 1: The Unauthorized Removal of Human Remains and Failure to Notify the State.

As part of the State's investigation, statements were obtained from Mr. Sinoto, Ms. Lee, and 13 others regarding this incident. Additionally, seven subpoenas for records were issued, and records were also obtained from various state officials. The statements and records disclose the following:

Sometime before noon on Saturday July 17, 2004 a single set of human remains was inadvertently discovered during work in an area used by construction vehicles for access from Makaloa Street into the Wal-Mart/Sam's Club project site. Construction equipment had exposed the edge of the burial and archeologists Sinoto and Lee then manually uncovered the burial to determine its extent. The burial was found in a flexed position and is presumptively Native Hawaiian. When a burial is said to be "flexed," it generally means that the remains were interred in a flexed position as opposed to having being interred in an extended position. Sinoto and Lee discussed the matter and Mr. Sinoto decided to disinter the remains and place them in the curation trailer. No attempt was made to contact the state authorities that day and the State was not notified of this discovery and the fact that the remains had been moved until Monday July 19, 2004. Failure to notify the authorities and the removal of the remains without State permission is against the law. HRS §6E-43.6 provides in relevant part as follows:

§6E-43(a) At any site, other than a known, maintained, actively used cemetery where human skeletal remains are discovered or are known to be buried and appear to be over fifty years old, the remains and their associated burial goods shall not be moved without the department's approval.

§6E-43.6(a) In the event human skeletal remains are inadvertently discovered, any activity in the immediate area that could damage the remains or the potential historic site shall cease until the requirements of subsections (b) to (d) have been met.

(b) The discovery shall be reported as soon as possible to the department, the appropriate medical examiner or coroner, and the appropriate police department. As soon as practicable, the department shall notify the appropriate council and the office of Hawaiian affairs.

(c) After notification of the discovery of multiple skeletons, the following shall be done within two working days, if on Oahu, and three working days, if in other council jurisdictions:

(1) A representative of the medical examiner or coroner's office and a qualified archaeologist shall examine the remains to determine jurisdiction. If the remains are the responsibility of the medical examiner or coroner, the department's involvement shall end. If the remains are historic or prehistoric burials, then the remainder of this section shall apply;

(2) The department shall gather sufficient information, including oral tradition, to document the nature of the burial context and determine appropriate treatment of the remains. Members of the appropriate council shall be allowed to oversee the on-site examination and, if warranted, removal; and

(3) If removal of the remains is warranted, based on criteria developed by the department, in consultation with the councils, office of Hawaiian affairs, representatives of development and large property owner interests, and appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawai'i Nei, through rules adopted pursuant to chapter 91, the removal of the remains shall be overseen by a qualified archaeologist and a mitigation plan shall be prepared by the department or with the concurrence of the department.

(d) In cases involving the discovery of a single skeleton, the requirements of subsection (c) shall be fulfilled in one working day if on Oahu, and two working days if in other council jurisdictions.

The department's administrative rules regarding burials provide in relevant part as follows:

§13-300-40 Inadvertent discovery of human remains. (a) The department shall have jurisdiction over any inadvertent discovery of human skeletal remains and any burial goods over fifty years old, regardless of ethnicity.

(b) The inadvertent discovery shall be immediately reported to the following persons:

- (1) The state historic preservation division, unless discovery occurs on Saturday, Sunday, or holiday at which time the report shall be made to the division of conservation and resource enforcement;**
- (2) The medical examiner or coroner from the county in which the inadvertent discovery occurred; and**
- (3) The police department of the county in which the inadvertent discovery occurred.**

(k) Intentional removal of inadvertently discovered human skeletal remains or burial goods is prohibited until a determination to relocate is made by the department pursuant to section 6E-43.6, HRS, and this chapter, except that the department shall be authorized to allow temporary removal of the remains or burial goods to protect from imminent harm, until a determination is made.

The notification procedure and the prohibition on removing burials is clear. In explaining his failure to notify the department, Mr. Sinoto indicated that the discovery occurred on a Saturday and the State does not work on Saturday. The fact that the discovery occurred on the weekend is no excuse as the rules specifically instruct the person making the discovery to contact the Division of Conservation and Resource Enforcement ("DOCARE") if the discovery occurs on a Saturday, Sunday or holiday. State records show that the number for DOCARE was working and the phone was staffed on the date

of the discovery. Additionally, former SHPD administrator, Dr. Holly McEldowney was in her office on Saturday from 10:30 a.m. to 3:45 p.m. and most of the day on Sunday and could have received the call. Accordingly, the state officials easily could have been reached. Mr. Sinoto admits that he moved the remains and that he made no effort to contact the state officials until Monday. In explaining why he moved the remains Mr. Sinoto indicated that the burial was an expansion of an area where approval to move remains had already been obtained and thus permission to move the remains was not required. This is incorrect. The State's letter dated February 26, 2004, only gave permission to move 42 sets of remains:

"As a reminder, the department needs to be notified immediately if any additional sets of human remains are discovered during removal of the currently known inadvertent discoveries. The disposition of these and any future inadvertent discoveries will be decided on a case by case basis and within time period allowed by statute (§6E-43.6)."

Thus, there was no blanket permission to move subsequent inadvertently discovered remains. There were numerous documents and other communications with Mr. Sinoto that made it clear that the State had to be notified of new inadvertent discoveries, and that these remains could not be moved without permission from the State. Indeed, many of these documents were prepared by Mr. Sinoto himself, for example, in the August 2002 Archeological Monitoring Plan that Mr. Sinoto prepared he promised to conduct all archeological work in accordance with the law and specifically commits that: "All inadvertent finds of human remains shall be treated in accordance with the provisions of Chapter 6E-43.6 and HAR 13-300." The November 2003 amendment to the plan prepared by Mr. Sinoto and Mr. Titchenal indicates that if discoveries are found the SHPD and others will be notified. Additionally, Mr. Sinoto was specifically told that there would be no predetermination to move remains. This occurred in or about February of 2004 when Mr. Sinoto specifically asked Dr. McEldowney if he could include in the data recovery plan a predetermination to move certain remains that might be inadvertently discovered. Dr. McEldowney told him that he could not have a predetermination and that the disposition of any future inadvertent discoveries would be decided on a case-by-case basis and in accordance with the statute. The May 18, 2004 letter from Dr. McEldowney to Mr. Sinoto, Mr. Titchenal, and Ms. Lee approving the data recovery plan provided that:

"As a reminder, SHPD needs to be notified immediately if any additional sets of human remains are discovered during removal of the currently known inadvertent discoveries. The disposition of these and any future inadvertent discoveries will be decided on a case by case basis and within the time period allowed by statute."

Thus, the requirement for notice was clear in the law, and clear in the communications of the parties. The failure to follow the law is made even more egregious by the fact that there were at least four other instances where notification was not timely made to the SHPD. These instances include the following: the State being notified of the January 17,

2003 discovery of remains by voice mail on January 20, 2003, the State being notified of a July 18, 2003 discovery of an infant on July 31, 2003, the State being notified of a January 13, 2004 discovery of two burials on January 14, 2004, and the State being notified of a January 15, 2004 discovery of remains on January 16, 2004. In this last instance notice occurred during Dr. McEldowney's unannounced field inspection. Removing the remains discovered on July 17, 2004, without permission and failing to provide timely notification justifies the imposition of penalties as recommended below.

Counts 2-18: The Unauthorized Physical Examination of Juvenile and Presumptively Native Hawaiian Remains

As part of the State's investigation, statements were obtained from Mr. Sinoto, Ms. Lee, Ms. Ikehara-Quebral, Ms. Regina Rash, Ms. Victoria Keana'aina, former SHPD administrator Dr. Holly McEldowney, and former SHPD archeologist and qualified osteologist Dr. Sara Collins. The interviews of Sinoto, Lee, Rash, Keana'aina, and Ikehara-Quebral were conducted in part in the trailer at the Wal-Mart site. During their interviews they were shown examples of the unauthorized physical examination. Additionally, three subpoenas for records were issued and records were also obtained from various state officials. The statements and records disclose the following:

Each burial at the Wal-Mart site was assigned its own number or letter to be used in identifying the burial as part of a burial find spot ("BFS"). The designation BFS-1, for example indicates burial find spot one. The further designation BFS-1 (A) indicates a specific burial, burial A of burial findspot 1. A total of 64 burials were discovered in six different find spots at the Wal-Mart site. The human remains from approximately a third of these burials were subjected to unauthorized physical examination. Eleven sets of remains that were subjected to unauthorized gluing came from burials that were presumptively Native Hawaiian burials because among other things human remains were found in a flexed position. Because the remains from these burials were presumptively Native Hawaiian, the remains should not have been subjected to any further analysis. Four of the burials that were subjected to unauthorized gluing were the burials of juveniles including infants. Because these burials were juvenile they should not have been subjected to any further analysis. No permission to glue any of these sets of human remains was requested, and no permission to glue them was granted. Additionally, there were two instances for which permission to glue had been requested and permission to glue was denied. Notwithstanding permission to glue having been denied, the perpetrators went ahead and glued them anyway. The remains from the flexed burials that were glued without permission are from BFS-1 (B), BFS-1 (C), BFS-1 (G), BFS-1 (Y), BFS-1 (Z), BFS-4 (4), BFS-4 (6), BFS-4 (7), BFS-4, (expansion 2), BFS-4 (expansion 4), BFS-6 (1). The juvenile remains that were glued without permission are from BFS-1 (I), BFS-1 (K), BFS-4 (6), BFS-5 (2). The two sets of remains that were glued despite the State having denied permission to glue them are from BFS-1 (H), and BFS-1 (U).

Because of the importance of protecting burials from unnecessary disturbance, physical examination of burials is prohibited unless expressly allowed by the State to determine ethnicity:

§13-300-32 (a) In order to accomplish the purposes of chapter 6E, HRS, including the preservation and protection of all burial sites and especially Native Hawaiian skeletal remains from unnecessary disturbance, physical examination of human skeletal remains over fifty years old is prohibited, unless expressly provided for in this section.

(b) Physical examination of human skeletal remains may be authorized by the department to help evaluate ethnicity as deemed necessary by section 13-300-31. Physical examination shall be conducted in a respectful manner, with recognition of the sensitivities associated with deceased human beings.

By law, physical examination methods are very limited and before any intrusive or destructive method of physical examination can take place written permission must be obtained to perform the analysis, and written permission must be granted by the State. Conducting unauthorized physical analysis is against the law and the perpetrator is subject to penalties as provided by law:

§13-300-32 (c) Physical examination methods shall consist only of the observation of metric, non-metric, or other relevant traits needed to suggest ethnicity, or a combination thereof, if necessary. Any intrusive or destructive examination method including, but not limited to, x-ray, radio carbon dating, and mitochondrial DNA analysis, is prohibited unless a written request is made to the department and written approval is granted prior to the initiation of any such examination. Photography of human skeletal remains subject to examination pursuant to this subsection shall be prohibited, unless written consent is first obtained from the council where ethnicity is suggested to be Native Hawaiian, or the department, where ethnicity is suggested to be non Native Hawaiian. Failure to comply with this subsection may subject a violator to the penalties stated in section 13-300-43.

(d) Commingled human skeletal remains shall be separated by individual following the relevant methods stated in subsection (c).

(e) Upon examination completion, each set of human skeletal remains representing an individual shall be covered with clean white cloth and placed in a plain cardboard container. Each container shall be clearly marked with burial site location, names of the examiners, and dates of examination. Skeletal remains not identified to a specific individual shall be covered with clean white cloth, placed in a plain cardboard container, and the container marked accordingly.

(f) Physical examination shall be conducted at a location approved by the department on the island where the human skeletal remains originated. Inter island transportation of human skeletal remains shall occur only with prior approval of the department.

(g) Within thirty days of completion of the physical examination, a report shall be submitted to the department for review and acceptance. The report shall include the following:

- (1) Number of individuals represented; and**
- (2) The suggested ethnicity of each individual or a finding that ethnicity could not be suggested by reasonable belief.**

Physical examination is for purposes of determining ethnicity and the separation of commingled remains. Before the osteological work began it was clearly understood that physical analysis of flexed and presumptively Native Hawaiian burials would not be permitted, and that physical analysis of juvenile remains would not be permitted. The April Data Recovery Plan prepared by Mr. Sinoto, Ms. Lee, and Mr. Titchenal expressly provided as follows:

"Limited Osteological Evaluation for Determination of Ethnicity for Individual Remains and/or Separation of Commingled Remains

A number of cultural descendants have been recognized by the OIBC. While we are not aware of information that conclusively determines either the ethnicity or temporal origins of specific individual remains, the manner and context of the burials of six individuals (BFS-1 (4), BFS-4 (1), and BFS-6 (1)), that have been interred in the flexed position, provide a basis for a reasonable belief that those individuals are Native Hawaiian in ethnicity. Accordingly, unless there are remains commingled with those individuals, further osteological evaluation of those six individuals is unnecessary.

Furthermore, as ethnicity cannot reliably be determined in juvenile remains, that is, those remains that are younger than adolescence, osteological evaluation of the individuals that have been determined to be juveniles, unless there are remains commingled with those individuals, is not warranted to determine ethnicity."

...

The State's May 18, 2004 letter accepting the Data Recovery Plan expressly stated that permission was required before any remains could be glued.

"No bones will be glued unless previously approved by SHPD. Gluing will only be approved if needed to render an accurate measurement that is critical to determining ethnicity or to match components of commingled remains. Gluing to repair broken remains will not be authorized.

The firm that Mr. Sinoto obtained to do the osteological work was well aware of these restrictions. The scope of work in their June 10, 2004 contract documents provided that :

"Per the archeological data recovery plan (Lee et al. 2004), all remains considered Native Hawaiian (based on archeological and mortuary context) and all pre-adolescent remains will be inventoried with no further osteological analysis. Per the prefield/pre-lab meeting with State Historic Preservation Division (SHPD) officials on June 2, 2004, further analysis for pre adolescent remains to determine familial groupings will be decided on a case-by-case basis by SHPD"

The parties knew which remains were probable Native Hawaiian remains and which sets of remains were juvenile remains. As part of their work archeologists and osteologists often prepare burial description forms. The burial description forms prepared by lead osteologist Rona Ikehara-Quebral, and prepared by Moana Lee, clearly indicated that for certain remains no analysis should be done because they were either the remains of juveniles or probable Native Hawaiian remains. Written on the very top of most of these forms were the words "No Analysis." The following are examples of some of the descriptions that appeared in the forms:

"Tightly flexed child, probable Hawaiian"

"per Aki Depth of burial & assoc burial goods suggests probable Hawaiian burial"

"Tightly flexed right leg over torso, lying on left side Probable Hawaiian"

"Flexed, probable Hawaiian burial"

"subadult"

"Infant buried at left shoulder/chest of presumed mother (burial I) Left arm flexed hand on chest. Legs appear to be extended"

"See arch report. Along Makaloa of LCA 100FL. Flexed burial next to (parallel?) adult (Burial M-presumed mother, head facing adult's lower chest"

"LCA 100FL - near dog. Flexed"

The contracted osteologists and archeologists prepared a November 8, 2004 status report for the State on the osteological analysis. The status report stated that for 15 sets of remains, analysis was not allowed because they were juvenile or probable Native Hawaiian remains.

"Analysis not allowed (probable Hawaiian and/or juvenile) per provisions of the Work Plan (Lee, Sinoto & Titchenal 2004).

Notwithstanding the prohibitions in the law, the limitations in the data recovery plan, the limitations in the archeologist's own contract, the burial description forms, and the status reports prepared by the archeologist, numerous juvenile and probable Native Hawaiian remains were glued without permission from the State. Both the necessity of requesting permission and the procedure for requesting permission to glue were clearly documented and all parties were on notice. This is highlighted by the fact that lead osteologist Rona Ikehara-Quebral sought permission in writing, and was granted permission to glue remains in six instances. Additionally, permission was sought to glue two other sets of remains but permission was denied. No permission was sought to glue the other remains that consisted of juvenile and probable Native Hawaiian remains.

Mr. Sinoto and others had clearly been notified that the gluing of remains would be an extremely sensitive issue with Native Hawaiians. Mr. Kanai Kapeliela, a cultural specialist with the burial sites program of the SHPD, was among the state officials who reviewed the Data Recovery Plan. The comments of the reviewers were provided to Mr. Sinoto and others. In his comments regarding the proposed gluing of remains Mr. Kapeliela commented as follows:

"The prospect of using glue to piece together ancestral remains is culturally offensive and is probably so across a number of different cultures here in Hawai'i. What is the purpose of gluing pieces of remains together (i.e., "repairing")? Can the same data be obtained without the use of adhesives? The mere handling of ancestral remains by archeologists and osteologists is offensive to a great number of Native Hawaiians today. The plan's suggestion of using glue to piece ancestral remains for osteological examination does nothing to endear anthropology to the hearts of these people and serves to feed and support the intense distaste many Native Hawaiians already feel towards anthropology and its sub-fields. Although some Native Hawaiians may support osteological examination, in its experience, the Burial Sites Program notes that their relatively small number are by far the exception and not the rule."

In response to questions posed during their interviews Mr. Sinoto, Ms. Ikehara-Quebral, and Ms. Lee indicated that they felt they had blanket permission to glue. Additionally, with respect to juveniles, Ms. Ikehara-Quebral and Ms. Lee indicated that they disagreed with the determination that juveniles should not be analyzed because their ethnicity cannot be reliably determined. They based their belief that they had blanket permission to glue on a statement allegedly made by Dr. Sara Collins, who told them that another individual, cultural specialist Kanai Kapeliela, had spoken to the Attorney General's Office, and had been told that permission to glue could not be denied for purposes of determining ethnicity. The statement is contrary to the law and the entire record of documents concerning the project as outlined above. More importantly no such advice was given by the Attorney General's office, and neither Mr. Kapeliela, nor Dr. Collins made any such statement. Dr. Collins was interviewed as part of the investigation. During her interview Dr. Collins stated that no blanket permission to glue was ever given. Mr. Kapeliela was also contacted as part of the investigation. He stated emphatically that

he was never told by the Attorney General's office that gluing could not be denied. Additionally, he never made any statement to that effect to Dr. Collins or to anyone else. Former SHPD administrator Dr. Holly McEldowney was also interviewed and stated that no blanket permission to glue was ever given.

Ms. Keana'aina and Ms. Rash are cultural descendants to the burials at the Wal-Mart site. They volunteered to work in the trailer and according to Mr. Sinoto served as interns under supervision. Both Ms. Lee and Ms. Ikehara-Quebral confirmed that these volunteers were subject to supervision. Ms. Keana'aina and Ms. Rash were interviewed and initially denied any gluing of remains or writing on remains. They also denied seeing anyone else glue or write upon remains, or having any knowledge of who had glued or written upon remains. Sometime subsequent to their interviews Ms. Keana'aina and Ms. Rash met with Ms. Lee, Ms. Ikehara-Quebral and Mr. Sinoto. Following this meeting Ms. Keana'aina and Ms. Rash contacted investigators from the Attorney General's Office and requested that they be re-interviewed. They were re-interviewed and completely changed their statements from their prior interview. In the new interview they admitted that their prior interview was untruthful, and that they had in fact glued remains. They further indicated that Ms. Lee had shown them how to glue remains. In addition to their admission, Ms. Lee herself admitted to gluing two sets of remains, and to taping the set of infant teeth to an index card. Ms. Lee admitted that she did not seek permission to glue the remains. Ms. Ikehara-Quebral claimed that she could not recall if she had glued any specific remains. Conducting physical examination in violation of the law and in contravention to the data recovery plan justifies the imposition of penalties as recommended below.

Counts 19 - 21: The Failure to Examine Human Skeletal Remains In a Respectful Manner With Recognition of the Sensitivities Associated with Deceased Human Beings.

The investigation disclosed that BFS 5-(1) is a child's burial. In addition to having been glued without permission, the child's cranium had been marked with red ink. Specifically, the numbers "1", "2", "3", and "4" were marked on various pieces of the child's cranium. Ms. Ikehara-Quebral, Mr. Sinoto, and Ms. Lee all deny having done this, or having any knowledge of who wrote on the child's skull. The investigation disclosed that BFS-1(L) is a juvenile burial. The juvenile's teeth from this burial had been taped to an index card. Ms. Lee admits to taping the child's teeth to the index card. The investigation disclosed that BFS-1 (T) is an adult burial. The bones of a human hand were stored inside a brown paper bag and the bag was labeled "Handbag Louis Vuitton." Ms. Lee admits to writing the word "Handbag" but denies writing the words "Louis Vuitton." Mr. Sinoto, and Ms. Ikehara-Quebral indicate that they have no knowledge of who labeled the bag "Handbag Louis Vuitton." Ms. Ikehara-Quebral, the lead osteologist indicated that she did not know that anyone had written on a skull.

HAR § 13-300-32(b) provides:

"Physical examination of human skeletal remains may be authorized by the department to help evaluate ethnicity as deemed necessary by section 13-300-31. Physical examination shall be conducted in a respectful manner, with a recognition of the sensitivities associated with deceased human beings."

Writing on a child's skull in red ink, taping a child's teeth to an index card, and writing "Handbag Louis Vuitton" on a bag containing a human hand demonstrates a lack of respect and clear disregard for the sensitivities associated with deceased human beings. These actions justify the imposition of penalties as recommended below.

ADMINISTRATIVE PENALTIES

The board may impose administrative penalties by order.

HRS §6E-11.6(a) In addition to any other administrative or judicial remedy provided by this chapter, or by rules adopted pursuant to this chapter, the board may impose by order the penalties specified in section 6E-11.5.

The administrative penalties that the board may impose are \$500 - \$10,000 for each separate offense.

HRS §6E-11.5 Any person who violates this chapter, or any rule adopted pursuant to this chapter shall be fined not less than \$500 nor more than \$10,000 for each separate offense. Each day of each violation constitutes a separate offense.

Factors to be considered in imposing penalties include:

- (1) The nature and history of the violation and any prior violations;
- (2) The economic benefit to the violator, or anticipated by the violator, resulting from the violation;
- (3) The opportunity, difficulty, and history of corrective action;
- (4) Good faith efforts to comply; and
- (5) Such other matters as justice may require.

HRS §6E11.6(b)

(1) The nature and history of the violation and any prior violations. With respect to this first factor to be considered by the board, the violations involved breaking laws that are intended to protect cultural and historic property within the State, particularly Native Hawaiian skeletal remains:

"The Constitution of the State of Hawaii recognizes the value of conserving and developing the historic and cultural property within the State for the public good. . ." HRS §6E-1.

"In order to accomplish the purposes of chapter 6E, HRS, including the preservation and protection of all burial sites and especially Native Hawaiian skeletal remains from unnecessary disturbance, physical examination of human skeletal remains over fifty years old is prohibited, unless expressly provided for in this section." HAR § 13-300-32(a).

There were 21 violations consisting of 17 instances of the unauthorized physical examination of the remains of children and probable Native Hawaiians, the removal of a set of remains without State permission and timely notification to the State, writing on a child's skull in red ink, taping a child's teeth to an index card, and writing "Handbag Louis Vuitton" on a paper bag used to store a human hand. There do not appear to be any prior violations.

(2) The economic benefit to the violator, or anticipated by the violator, resulting from the violation. With respect to this second factor, with the exception of the two descendants who volunteered and worked as interns, the violators were all contract archeologists and osteologists who were being paid to work on the remains discovered at the Wal-Mart site.

(3) The opportunity, difficulty, and history of corrective action. With respect to the third factor, the violators easily could have provided notice to the appropriate officials and sought permission before removing remains or gluing remains.

4) Good faith efforts to comply. With respect to the fourth factor, by his own admission Mr. Sinoto made no attempt to contact the state authorities until two days after the discovery of additional human remains. Additionally he did not wait to obtain permission to move the remains but instead went ahead and moved the remains without permission. With respect to the gluing, Ms. Lee indicated that she never sought specific permission to glue any remains. Ms. Ikehara-Quebral sought permission to glue remains in eight instances and then stopped seeking permission. In two of these instances the department expressively denied permission to glue, notwithstanding this denial gluing occurred in these cases.

5) Such other matters as justice may require. As far as the fifth factor the board should consider that these violations occurred during the course of a highly publicized lawsuit and public meetings of the Oahu Island Burial Council. During the course of the lawsuit and the burial council meetings, the sensitivity of issues concerning Native Hawaiian remains and the burial laws were widely discussed, and numerous individuals had already publicly expressed outrage over the movement and treatment of burials at the Wal-Mart site. The unnecessary disturbance of the burials that were subjected to unauthorized examination was conducted in a manner that was disrespectful and without cultural sensitivity. The violators knew or should have known that their actions would spark outrage.

LIABILITY

Pursuant to HRS §6E-11.5 any person who violates chapter 6E and its administrative rules is subject to penalties. Accordingly, Mr. Sinoto and Aki Sinoto Consulting, a sole proprietorship, are liable for Count 1 the unauthorized removal of a set of remains and the failure to notify the state in violation of HRS §6E-43(a), HRS §6E-43.6(a), HRS §6E-11, and HAR §13-300-40. Ms. Lee who admitted to gluing two sets of remains, taping a set of infant teeth to an index card, and writing "Handbag" on the paper sack containing the human hand is liable for violating HAR §13-300-32.

Pursuant to title 13, chapter 281 HAR, Paul Titchenal as principal investigator for the archeological component of the work is responsible for assuring the quality of all aspects of a historic preservation project and the accuracy and completeness of the reports. Mr. Titchenal is therefore also liable for Mr. Sinoto and Aki Sinoto Consulting's violation of HRS §6E-43(a), HRS §6E-43.6(a), HRS §6E-11, and HAR §13-300-40.

Pursuant to title 13, chapter 281 HAR, J. Stephen Athens as principal investigator for the osteological component of the work is responsible for assuring the quality of all aspects of an historic preservation project and the accuracy and completeness of the reports. Mr. Athens is therefore responsible for the violations of Ms. Lee and others regarding the unauthorized physical examination of remains.

Mr. Sinoto served as the head archeologist for the project. Mr. Sinoto employed Ms. Lee on a verbal contract and Mr. Sinoto had a written contract with IARII to do the osteological work for the project. Accordingly Ms. Lee and IARII and its employees were the agents of Mr. Sinoto. In addition to his other bases of liability, Mr. Sinoto and his company as principal can be held vicariously liable for the actions of his agents under the theory of respondeat superior.

"It is well established that '[a] master is subject to liability for the torts of his [or her] servants committed while acting in the scope of their employment. . . . [a]n act may be within the scope of employment although consciously criminal or tortious"

State v. Hoshijo ex rel. White, 102 Hawaii 307, 319, 76 P.3d 550, 562 (2003). This doctrine extends to volunteers acting under close control and where a clear master servant relationship existed. Malloy v. Fong, 37 Cal 2d 356, 232 P.2d 241 (1951). Mr. Sinoto has described the volunteers as interns. He has also stated that they were only given work consistent with their skill level and that these assistants working in the lab would be closely supervised by Ms. Lee, or Ms. Ikehara-Quebral. Ms. Lee and Ms. Ikehara-Quebral also confirmed that the volunteers were under supervision. Accordingly, Mr. Sinoto and his company are also liable for the actions of these volunteer interns who were closely supervised by his other agents.

Additionally, "A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm

caused to them by the failure of such agent to perform the duty" Restatement (Second) of Agency §214 (1958).

REVOCATION OF PERMIT

A permit from the department is required to conduct archeological activities in the State of Hawaii. Aki Sinoto Consulting holds permit number 0520 for the calendar year 2005. Pursuant to HAR §13-282-5 (3) a permit may be revoked for failure to fulfill the conditions of the permit. One of the conditions of the permit is that Aki Sinoto Consulting "comply with all applicable statutes, ordinances, rules and regulations of the federal, state and county governments." Aki Sinoto Consulting's permit is therefore subject to revocation for failure to comply with State law as set forth above.

STAFF RECOMMENDATION

Staff recommends that the board issue an order pursuant to HRS §6E-10.5(a)(2) imposing penalties as follows:

- 1) An administrative penalty of \$10,000 against Akihito Sinoto, Aki Sinoto Consulting, and Paul Titchenal jointly and severally, for the failure to timely notify the authorities of an inadvertent discovery, and for moving the set of remains without permission in violation of HRS §6E-43(a), §6E-43.6(a), and §6E-11 (Count 1).
- 2) An administrative penalty of \$150,000 against Akihito Sinoto, Aki Sinoto Consulting, International Archeological Research Institute, Inc, and J. Stephen Athens, jointly and severally, for the unauthorized physical examination of 15 sets of juvenile remains or presumptively Native Hawaiian remains in violation of HAR §13-300-32 (Counts 2-16).
- 3) An administrative penalty of \$20,000 against LJ Moana Lee, Akihito Sinoto, Aki Sinoto Consulting, International Archeological Research Institute, Inc, and J. Stephen Athens jointly and severally for the unauthorized physical examination of two sets of juvenile remains or presumptively Native Hawaiian remains in violation of HAR §13-300-32 (Counts 17, 18).
- 4) An administrative penalty of \$10,000 against LJ Moana Lee, Akihito Sinoto, Aki Sinoto Consulting, International Archeological Research Institute, Inc, and J. Stephen Athens, jointly and severally, for the failure to examine human skeletal remains in a respectful manner with a recognition of the sensitivities associated with deceased human beings in violation of HAR §13-300-32 (Count 19)(Writing "Handbag Louis Vuitton" on the bag containing a human hand).
- 5) An administrative penalty of \$10,000 against Akihito Sinoto, Aki Sinoto Consulting, International Archeological Research Institute, Inc, and J. Stephen Athens, jointly and severally, for the failure to examine human skeletal remains in

a respectful manner with a recognition of the sensitivities associated with deceased human beings in violation of HAR §13-300-32 (Count 20)(Writing in indelible red ink on the skull of a child).

6) An administrative penalty of \$10,000 against LJ Moana Lee, Akihito Sinoto, Aki Sinoto Consulting, International Archeological Research Institute, Inc, and J. Stephen Athens jointly and severally for the failure to examine human skeletal remains in a respectful manner with a recognition of the sensitivities associated with deceased human beings in violation of HAR §13-300-32 (Count 21)(Taping an infant's teeth to an index card).

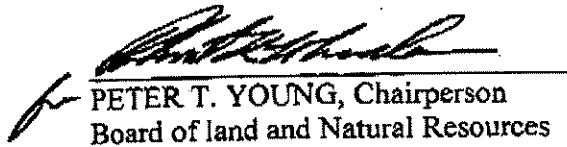
7) The revocation of permit number 0520 issued to Aki Sinoto Consulting for the calendar year 2005.

Respectfully submitted,



Melanie A Chinen
Administrator,
Historic Preservation Division

Approved for submittal:



PETER T. YOUNG, Chairperson
Board of land and Natural Resources